Supreme Court, U.S.
FILED

0214 28 NOV 2 7 2002

OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

DIANA L. SLADEK,

PETITIONER,

v.

SALLY ZEMAN,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

DIANA L. SLADEK
PRO SE
225 S. ACADEMY
SUITE 201
COLORADO SPRINGS,
COLORADO 80910
719-632-1177

35 pp

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THERE IS A CONFLICT BETWEEN THE CIRCUITS REGARDING THE INTERPRETATION OF THE BANKRUPTCY LAWS.

II

WHETHER THE MALPRACTICE ACTION FILE BY PETITIONER IN THE STATE OF COLORADO IS EXEMPT FROM THE BANKRUPTCY ESTATE.

III

WHETHER THE PROCEEDS FROM THE MALPRACTICE ACTION FILED IN THE STATE OF FLORIDA ARE EXEMPT FROM THE BANKRUPTCY ESTATE.

IV

WHETHER THE BANKRUPTCY COURT ERRED IN CONVERTING PETITIONER'S CHAPTER 13 FILING INTO A CHAPTER 7 BANKRUPTCY.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iv

OPINION BELOW. 1

JURISDICTION. 1

STATEMENT OF THE CASE. 1

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT. 6

REASONS FOR GRANTING THE WRIT. 8

I. THE RULING BY THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT CREATES A CONFLICT WITH OTHER CIRCUITS AS TO WHETHER A MALPRACTICE CASE IS PART OF A BANKRUPTCY ESTATE OR WHETHER IT IS EXEMPT FROM THE BANKRUPTCY ESTATE AND THE RULES THAT BANKRUPTCY TRUSTEES MUST FOLLOW IN SELLING ASSETS OF A BANKRUPTCY ESTATE. 8

A. The District Court erred in affirming the Order of the Bankruptcy Court denying Petitioner's claim of exemption for the civil litigation of the Mikos case in Colorado state court. 9

B. The Bankruptcy Court erred in denying Petitioner's claim of exemption for the proceeds of the Boyar probate case litigation in Florida state court. 20

II. THE PETITIONER HAD AN ABSOLUTE RIGHT TO CONVERT T0 A CHAPTER 13 BANKRUPTCY. . . . 22

A. The Bankruptcy Court erred in granting the Chapter 13 Trustee's Motion to convert to a Chapter 7. 22

CONCLUSION AND PRAYER FOR RELIEF. 29

APPENDIX

Court of Appeals for the Tenth Circuit Decision and Judgment. . .EXHIBIT A

District Court for the District of Colorado Memorandum Decision on Appeal. . . . . EXHIBIT B

TABLE OF AUTHORITIES

U.S. COURT OF APPEALS CASES **Page**

In re Abbotts Dairies of Pennsylvania, Inc.,
788 F.2d 143(3rd Cir. 1986).....14,15,16,17

In re Bel Air Assocs.,
706 F.2d 301(10th Cir. 1983).....16

In re Mark Bell Furniture Warehouse, Inc.,
992 F.2d 7(C.A. 1st 1993).....13

In re Martin,
880 F.2d 857(5th Cir. 1989).....23

In re Rock Indus. Mach. Corp.,
572 F.2d 1195(7th Cir. 1978).....15,16,17

Taylor v. Lake(In re Cada Invs.),
664 F.2d 1158(9th Cir. 1981).....17

U.S. DISTRICT COURT CASES

Alcman Services Corp. v. Bullock,
925 F.Supp. 252(D.N.J. 1996).....12

U.S. BANKRUPTCY COURT CASES

In re Brent Explorations, Inc.,
91 B.R. 104(Br.D.Co. 1988).....23,26

Scarlett v. Barnes,
121 B.R. 578 (W.D. Mo. 1990).....10,12,18,19,21

STATE CASES

Aaron v. Allstate Insurance Co.,
559 S.2d 275(Fla.Dist.Ct.App. 1990). 11,21

Brocato v. Prairie State Farmers Insurance Association,
520 N.E.2d 1200(Ill.App.Ct. 1988). 11

Chaffee v. Smith,
645 P.2d 966(Nev. 1982). 11

Forsthove v. Hardware Dealers Mutual Fire Insurance Co.,
416 S.W. 2d 208 (Mo.Ct.App. 1967). 10

Goodley v. Wank & Wank, Inc.,
62 Cal.App. 3d 389(Ct.App. 1976). 11

Gunn v. Mahoney,
408 N.Y.S.2d 896(Sup.Ct.1978). 11

In re the Matter of Larry Sather,
99 SA 72, Colorado Supreme Court,
May 22, 2000. 25

Moorhouse v. Ambassador Insurance Co.,
383 N.W.2d 219(Mich.Ct.App. 1985). 11

Roberts v. Holland & Hart,
857 P.2d 492(Colo.App. 1993). 11,12,13,19

Schroeder v. Hudgins,
690 P.2d 114 (Az.Ct.App. 1984). 10

Thurston v. Continental Casualty Company,
567 A.2d 922(Me. 1989). 11

STATUTES

11 U.S.C. 363(b)(1). 16

11 U.S.C. 363(f). 13

11 U.S.C. 363(m). 13,14,16

11 U.S.C. 706. 23

18 U.S.C. 1254(1). 1

Colorado Revised Statutes 13-54-102(1)(n). 11

Colorado Revised Statutes 13-54-192. 19

Colorado Revised Statutes 13-54-194. 19

OTHER

U.S Supreme Court Rule 10(b). 8

Bankrupcty Rule 805. 14,16

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit is not published. A copy of the opinion is appended to this petition as Exhibit A. A copy of the Order and Judgment of the U.S. District Court for the District of Colorado is attached as Exhibit B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1), to review the judgment of the U.S. Court of Appeals for the Tenth Circuit affirming the order and judgment of the U.S. District Court for the District of Colorado affirming an order and judgment from a bankruptcy court.

STATEMENT OF THE CASE

Petitioner/Debtor filed a Chapter 7, proceeding, and later converted to a Chapter 13 proceeding. The Debtor listed several exemptions on her schedules.

The Chapter 13 Trustee objected to these exemptions,

and also filed a Motion to Convert the proceeding back to a Chapter 7.

The Bankruptcy Court upheld the Trustee's objections to the exemptions, and granted the Motion to Convert, said Order appealed to the U.S. District Court for the District of Colorado.

On October 11, 2001, the U.S. District Court entered its Memorandum Decision on Appeal affirming the rulings of the Bankruptcy Court. On October 12, 2001, the U.S. District Court entered Judgment.

On November 5, 2001, Petitioner filed her Notice of Appeal with the Tenth U.S. Circuit Court of Appeals.

On August 29, 2002, the Tenth U.S. Circuit Court of Appeals affirmed the order and judgment of the U.S. District Court.

STATEMENT OF THE FACTS

On March 23, 1998, Diana Sladek and her husband filed a Chapter 7 Bankruptcy Petition with the U.S. Bankruptcy Court for the District of Colorado. An Order of Discharge was entered on July 15, 1998.

In or around December, 1998, Diana Sladek received word from the Personal Representative of her father's probate estate in Florida, that the estate had settled a malpractice case in Florida against the first Personal Representative of the probate estate and an accountant, and that she was to receive her share of the proceeds. Later, the Personal Representative called stating that Kenneth Mikos who Diana Sladek had hired to represent her in the probate estate and had later fired, notified her that he had an attorney's lien against any proceeds going to Diana Sladek.

Diana Sladek told the Personal Representative about the bankruptcy and did not know what effect that would have on the lien, and that a malpractice claim against Mikos in Colorado that had been dismissed but was on appeal. The Mikos lien and lawsuit had not been listed in the bankruptcy petition since the lien had been put in place many years previously, the proceeds from the probate estate had been distributed, and it was simply forgotten. The Mikos lawsuit had been on appeal for a long time and was also forgotten

since it had been dismissed.

On April 6, 1999, the U.S. Trustee filed a Motion to Reopen the case. A successor Trustee was appointed.

Subsequently, an Adversary Complaint was filed against Diana Sladek and her husband on July 15, 1999.

On November 15, 1999, Diana Sladek and her husband filed a Motion to Convert to Chapter 13.

On November 19, 1999, the Chapter 7 Trustee filed a Motion to Sell the Mikos lawsuit.

On November 29, 1999, the Court granted the Motion to Convert to Chapter 13.

Subsequently, Diana Sladek and her husband hired an experienced bankruptcy attorney to handle the case. Amended Schedules were then filed to correct the problems, which the Mikos lawsuit and the proceeds from the Florida lawsuit.

The Chapter 13 Trustee filed objections to those exemptions on April 11, 2000, and an Objection to the confirmation of the Chapter 13 Plan. A hearing was

scheduled for July 12, 2000, on the objections to the exemptions and the objection to confirmation.

On July 9, 2000, counsel for Diana Sladek and her husband posted for filing, an Amended Chapter 13 Plan along with amended Schedules that would better satisfy the Chapter 13 Trustee and the creditors.

The Chapter 13 Trustee received the those on July 11, 2000, however the Court had not received them by July 12, 2000, the date of the hearing.

The Court refused to continue the hearing until such time as it had received the Amended Plan and Schedules and would not consider them for the hearing. The Court did receive the Amended Plan and Schedules on July 13, 2000.

At the hearing on July 12, 2000, the Bankruptcy Court granted the objections of the Chapter 13 Trustee as it regarded the Mikos lawsuit, and the proceeds from the Florida lawsuit. The Court also granted the Trustee's objection to confirmation, and converted the case back to a Chapter 7.

On July 20, 2000, Diana Sladek filed her Notice of Appeal on the above rulings

On October 11, 2001, the U.S. District Court denied the appeal and entered judgment on October 12, 2001.

Subsequently, Diana Sladek filed a Notice of Appeal with the U.S. Tenth Circuit Court of Appeals.

On August 29, 2002, the Tenth Circuit Court of Appeals affirmed the decision of the U.S. District Court affirming the decision of the U.S. Bankruptcy Court.

SUMMARY OF THE ARGUMENT

At a Bankruptcy Court hearing on July 12, 2000, the Bankruptcy Court upheld the Chapter 13 Trustee's objections to Appellant/Debtor's claims for exemptions of a malpractice law suit filed in Colorado against Appellant/Debtor's Florida attorney, Kenneth Mikos, and the proceeds of a malpractice law suit filed in Florida by the probate estate of Appellant/Debtor's father against the first Personal representative of the probate estate and an

Accountant and granted the Chapter 13 Trustee's Motion to Convert the bankruptcy back to a Chapter 7.

The orders of the Bankruptcy Court must be reversed and remanded .

First, the claims for exemptions of the malpractice actions must be allowed.

Bankruptcy courts have been held that when malpractice actions are not assignable under the law of the state of the bankruptcy court, they cannot be included in the bankruptcy estate. Colorado holds that malpractice claims are not assignable and are not part of the bankruptcy estate.

Additionally, the bankruptcy trustee did not sell the Mikos litigation to a good faith purchaser for value.

Second, the Chapter 13 plan must be reinstated. The Bankruptcy Court in granting the Motion to Convert back to a Chapter 7, stated that Appellant/Debtor's plan was speculative. The one thing that neither the Chapter 13 Trustee nor the Bankruptcy Court can deny, is that Appellant/Debtor was current on all payments under the

plan.

REASONS FOR GRANTING THE WRIT

I

THE RULING BY THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT CREATES A CONFLICT WITH OTHER CIRCUITS AS TO WHETHER A MALPRACTICE CLAIM IS PART OF A BANKRUPTCY ESTATE OR WHETHER IT IS EXEMPT FROM THE BANKRUPTCY ESTATE AND THE RULES THAT BANKRUPTCY TRUSTEES MUST FOLLOW IN SELLING ASSETS OF A BANKRUPTCY ESTATE.

Rule 10(b) of this Court, allows this Court to grant a writ of certiorari when there is a conflict between circuits over a question of law. The ruling of the U.S. Court of Appeals for the Tenth Circuit affirming the Order and

judgment of the U.S. District Court for the District of Colorado which affirmed the order and judgment of the U.S. Bankruptcy Court for Colorado creates a conflict between the circuits. The ruling by the U.S. Court of Appeals for the Tenth Circuit falls in the minority view holding that malpractice actions are part of the bankruptcy estate, while the majority of the circuits hold that malpractice claims are not part of the bankruptcy estate. Additionally, the ruling of the U.S. Court of Appeals for the Tenth Circuit creates a conflict with the rules that bankruptcy trustees must follow in selling assets of a bankruptcy estate.

A. The District Court erred in affirming the Order of the Bankruptcy Court denying Petitioner's claim of exemption for the civil litigation of the Mikos case in Colorado state court.

Petitioner Diana Sladek and her two children had filed a malpractice lawsuit against a Florida attorney, Kenneth Mikos, who represented her and her children in the

probate of her father's Florida estate. The case, after being dismissed, was reinstated by the Colorado Court of Appeals.

In her schedules, Petitioner Diana Sladek listed this as an exemption from the Bankruptcy Estate. The Chapter 13 Trustee filed an objection to this, a hearing was held, and the Bankruptcy Court denied the exemption. A malpractice action is not part of the bankruptcy estate if it is not an assignable cause of action. Scarlett v. Barnes, 121 B . R. 578, 579 { W .D .Mo .1990) . The Scarlett Court held that:

> "[u]nder Missouri law, debtor's cause of action for legal malpractice was personal, unassignable claim, and therefore was not subject to attachment and was exempt from bankruptcy estate."

Scarlett at 581-583.

The Scarlett Court ruled this way on a public policy concern . The rationale for retaining this rule of non-assignability for personal tort claims is one of public policy prohibiting the "traffic[king] in law suits for pain and suffering." Forsthove v. Hardware Dealers Mutual Fire Insurance Co., 416 S.W.2d 208, 217 (Mo.Ct.App.1967).

Other jurisdictions that have likewise held that where malpractice claims are not assignable under a state law, they are not part of the bankruptcy estate. 9th Circuit.: Schroeder

v. Hudgins, 690 P.2d 114(Az.Ct.App.1984); Goodley v. Wank & Wank, Inc., 62 Cal.App. 3d 389(Ct.App. 1976); Chaffee v. Smith, 645 P.2d 966 (Nev. 1982); 11th Circuit: Aaron v. Allstate Insurance Co., 559 S.2d 27 (Fla.Dist.Ct.App. 1990); 7th Circuit: Brocato v. Prairie State Farmers Insurance Association, 520 N.E. 2d 1200(Ill.App.Ct. 1988); 6th Circuit: Moorhouse v. Ambassador Insurance Co., 383 N.W. 2d 219(Mich.Ct.App. 1985); 2nd Circuit: Gunn v. Mahoney, 408 N.Y.S. 2d 896 (Sup.Ct. 1978). Furthermore, Colorado law treats personal injury claims as exempt property. C.R.S. 13-54-102(1)(n).

A few jurisdictions, however, have permitted the assigning of such claims at least under some circumstances. 1st Circuit. See Thurston v. Continental Casualty Company, 567 A. 2d 922 (Me. 1989) which allowed the assignment of a legal malpractice case only to one who had an intimate connection with the underlying law suit.

This begs the question as to whether legal malpractice claims are assignable under Colorado law.

In Roberts v. Holland & Hart, 857 P.2d 492, 493 {Colo.App. 1993) the Court said:

"Legal malpractice claims are not assignable as a matter of public policy."

Additionally, the Roberts Court said:

"The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who never had any prior connection with the assignor or his rights... The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession."

Also, the Roberts Court noted that the assignment of legal malpractice claims conflicted with the Colorado Rules of Professional Conduct.

Other jurisdictions have held the same way. See Alcman Services Corp. v. Bullock, 925 F.Supp. 252, 257-258 (D.N.J. 1996).

What is noteworthy is that the Colorado Court of Appeals cited the Scarlett case. Clearly, Scarlett influenced the Court . If the Court did not intend for Roberts to apply to bankruptcy, it would not have to cite Scarlett. It could just have cited other non-bankruptcy cases that simply hold that malpractice actions are not assignable.

It is clear that the Roberts Court had three concerns:

merchandizing, commercial aspect and exploitation which all occurred in this case.

The Chapter 7 Trustee improperly sold the Mikos law suit back to Defendant Mikos. 11 U.S.C. 363(f) states:

> "The trustee may sell property under subsection (b) or (c) free and clear of any interest in such property of an entity other than the estate, only if-
>
> (1) applicable non-bankruptcy law permits sale of such proper free and clear of such interest;"

Colorado law prohibits the actions of the trustee since a malpractice law suit is not assignable under Colorado law. Roberts, supra. Based on this holding, the Mikos litigation could not be assigned to the trustee and cannot be part of the bankruptcy estate. Hence, under non-bankruptcy law, the trustee could not sell the law suit to Mikos or anyone else.

Both 11 U.S.C. 363(m) and former Bankruptcy Rule 805 only apply when the buyer is a good faith purchaser. For purposes of 11 U.S.C. 363(m), "good faith" purchaser is one who buys property in good faith and for value, without knowledge of adverse claims. In re Mark Bell Furniture Warehouse, Inc., 992 F.2d 7 (C.A. 1st 1993). Black's Law

Dictionary 7th Edition defines a bona fide purchaser (synonymous with good faith purchaser) as:

> "[o]ne who buys something of value without notice of another's claim to the item or of any defects in the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

Mikos knew of the adverse claims in the law suit against him by Plaintiff and knew of the bankruptcy proceedings. Mikos was not a good faith purchaser. His motivation was to buy back the lawsuit against him at a bargain basement price.

In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3rd Cir. 1986), the Appellate Court reversed the order of the Bankruptcy Court which confirmed the sale of debtor's assets to a purchaser. The Court focused on the concept of value. Part of both 11 U.S.C. 363(m) and former Bankruptcy Rule 805 is that the good faith purchaser must pay valuable consideration. Traditionally, courts have held that "fair and valuable consideration is given in a bankruptcy sale when the purchaser pays 75% of the appraised value of the assets."

Abbotts at 149 citing In re Rock Indus. Mach. Corp., 572 F.2d 1195 (7th Cir. 1978).

In Abbotts, the sale was at an auction. The Court held that this did not constitute value of the assets, since no appraisal was done, and voided the sale. In the instant case, not only was there no auction there was no appraisal at all. In the trustee's first motion to sell the Mikos litigation, the trustee sought to sell the suit back to Mikos for $10,000.00. In that motion the trustee stated, "even if the Trustee determined that the Claims Against Mikos had substantial merit, a determination the Trustee has not made." The Trustee never attempted to value the Mikos litigation. In the trustee's second motion to sell, it says, "The Trustee does not believe that the claims against Mikos have substantial merit." The trustee, a non-malpractice attorney, made the determination that the Mikos litigation has little value without having an experienced malpractice attorney value it. The trustee's first motion was for a sale worth 25% of the value. The second motion was for a sale worth 37.5% of the

value. Both of these are below adequate value. In accordance with the holding in Abbotts, Mikos has not paid the requisite value for the law suit.

Abbotts addressed other aspects of the sale. The Bankruptcy Court in this case never made a finding with respect to the good faith of Mikos. "When a bankruptcy court authorizes a sale of assets pursuant to section 363(b)(1), it is required to make a finding with respect to the "good faith" of the purchaser." Abbotts at 150.

Abbotts also went into a deeper analysis of a "good faith" purchaser where the Court said that:

> "[u]nfortunately, neither the Bankruptcy Code nor the Bankruptcy Rules attempts to define "good faith." Courts applying section 363(m) and its predecessor Fed.R.Bankr.P. 805 have, therefore, turned to traditional equitable principles, holding that the phrase encompasses one who purchases in "good faith" and for "value." See e.g.. In re Bel Air Assocs., 706 F.2d 301, 305 (10th Cir. 1983); In re Rock Indus. Mach. Corp., 572 F.2d 1195, 1197 (7th Cir. 1978).
>
> 'The requirement that a purchaser act in good faith... speaks to the integrity of his conduct in the course of the sale proceedings. Typically. the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud,

> collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.' In re Rock Indus. Mach. Corp., 572 F.2d at 1198; see also Taylor v. Lake(In re Cada Invs.), 664 F.2d 1158, 1162 (9th Cir. 1981); ("Courts have generally appeared willing to set aside confirmed sales that were tinged with fraud, error or similar defects which would in equity affect the validity of any private transaction.'")." Abbotts at 147-148.

The sale of the lawsuit to Mikos constituted fraud and collusion between Mikos and the trustee, and the taking of unfair advantage of other bidders of which there were none. Mikos' attorney was involved with the bankruptcy proceedings from their beginning. In short, there was a direct link. The motivation between the trustee and Mikos was simple. The trustee could unload the Mikos litigation for enough money to pay her attorney without having to do any work to see if the litigation had merit, and Mikos could save his skin at a low price. What should also be pointed out is that the trustee stated that the estate does not have the assets to litigate the claims. The case had been filed, all fees paid. Almost all malpractice attorneys take cases like this on a contingency, so the estate would not have incurred any costs.

Additionally, the actions of the trustee and Mikos took unfair advantage of any bidders who might have bid on the suit. As stated , the only others that the trustee solicited a bid from were the Debtors. This is also incorrect as no bid was ever solicited from the Debtors. The trustee, by her actions and Mikos', excluded anyone who could have bid on the litigation.

The Mikos' litigation was improperly sold against non-bankruptcy law, to a bad faith purchaser, and for grossly inadequate consideration.

The Bankruptcy Court, on the contrary, refers to the proposition from the holding in Scarlett as "ridiculous." What the Court has done is "to not only disagree with Scarlett, but also all of the other bankruptcy courts in other states that agree with Scarlett which constitute a majority.

All of the bankruptcy courts that have addressed this question make their resolution of the issue by looking to the applicable state law about whether a malpractice action is assignable. If it is, the action is not exempt from the estate. If

it is not assignable, it is exempt from the estate.

Petitioner agrees that this holding has not been adopted in this jurisdiction, but it should be, and adopted in accordance with the holdings of those courts who have resolved the issue on the basis of the assignability of malpractice actions.

The District Court stated that the only law cited by Petitioner to support her position has to do with assignment of malpractice claims. As shown above, that is incorrect. Petitioner has cited numerous cases that support her contention that malpractice claims are not part of the bankruptcy estate. The District Court also states that Petitioner's claimed exemption is not part of the statutory exemptions listed in Colo.Rev.Stat. 13-54-192 and 13-54-194. It is clear from reading Roberts that the Colorado Court of Appeals held that malpractice claims are not assignable and relied upon the holding in Scarlett, that malpractice claims are not part of the bankruptcy estate, to support its decision.

The District Court also stated that the trustee is not seeking assignment of the claim. It is the trustee for which the claim is assigned which violates Colorado law. Petitioner has no idea where the District Court came up with the idea that Petitioner did mean for this claim to be listed as an exemption, but that it was improperly included in the bankruptcy estate. Petitioner totally intended this claim to be an exemption when she filed her amended petition.

The Bankruptcy Court erred in denying the exemption of Petitioner/Debtor, and the District Court erred in affirming the decision of the Bankruptcy Court.

B. The Bankruptcy Court erred in denying Petitioner's claim of exemption for the proceeds of the Boyar probate case litigation in Florida state court.

Petitioner Diana Sladek is the beneficiary of her father's estate which is still in probate in Florida. Subsequent to the Florida Court appointing a successor Personal Representative, a malpractice action was commenced which resulted in proceeds for Petitioner Diana Sladek.

In her schedules, Petitioner Diana Sladek listed this as an exemption from the Bankruptcy Estate. The Chapter 13 Trustee filed an objection to this, and the Bankruptcy Court denied the exemption. The Court erred.

Since this was an action brought by a Personal Representative against the former Personal Representative in a Florida probate case, brought in a Florida court, for acts occurring in Florida, it is Florida law that applies. Malpractice actions in Florida are not considered part of the bankruptcy estate. See Aaron v. Allstate Insurance Co., 559 So.2d 275, 277 (Fla.Dist.Ct.App. 1990) as stated in Scarlett at 582.

Therefore, the proceeds of the malpractice action in the Boyar estate are not part of the bankruptcy estate.

The Court tries to create a distinction by contending that it is not a malpractice claim of the Debtor Diana Sladek, implying that it is a claim of the probate estate. The Court tries to support that argument by stating that the claim was there when decedent died in 1989. The claim arose after the death of decedent, brought about by actions of the first personal representative and an accounting firm that did post-death accounting. It is still a claim of the Debtor as she was

an heir to the probate estate who along with the other heirs are the probate estate. If not, then under Florida law, the probate estate could have gone forward on its own to prosecute the action. All of the heirs, including Debtor Diana Sladek, had to give their permission to prosecute the malpractice action. If not, it could not have gone forward.

The District Court, like the first issue, affirmed the Order of the Bankruptcy Court.

The Bankruptcy Court and the District Court erred in denying the exemption for the Florida malpractice action.

II

THE PETITIONER HAD AN ABSOLUTE RIGHT TO CONVERT TO A CHAPTER 13 BANKRUPTCY.

A. The Bankruptcy Court erred in granting the Chapter 13 Trustee's Motion to convert the bankruptcy to a Chapter 7.

Debtor's right to convert is absolute and courts will not interfere with that right in absence of extreme circumstances and fact that debtor had already been discharged of her debts prior to motion to convert is of no

consequence. 11 U.S.C. 706. In re Martin, 880 F.2d 857, 859 (5th Cir. 1989).

The Chapter 13 moved to reconvert on her contention of the feasibility of the proposed plan. The Trustee contended that the Debtors lacked the ability to effectuate a plan. That contention cannot be raised at this stage of the proceedings. Chapter 11 petition may be dismissed or converted based on debtor's "inability to effectuate plan" only in situations in which plan has actually been confirmed, and debtor is unable to fulfill its obligations thereunder. In Re Brent Explorations, Inc., 91 B.R. 104, 110 (Br.D.Col. 1988). Here the plan had not been confirmed, and it was improper to consider feasibility at this time. Debtors were current with their payments. The fact that Brent involved a Chapter 11, where this is a Chapter 13, is of no significance since it is confirmation and inability to fulfill obligations that controls.

The Bankruptcy Court held that Debtors had acted in bad faith.

Initially, the Bankruptcy Court discussed the schedules and statements of the Debtors. The Bankruptcy Court criticized the claim of exemption of the Florida

malpractice case i.e. Lamberdis as being specious and that there could be no credible claim. Debtor Diana Sladek was an heir to the Boyar estate and had a legitimate claim of an exemption to the proceeds of the malpractice action in Florida based on Florida law. It could be argued, analogous to Rule 11, that it constitutes an argument for a change in the existing law. As stated above, she and the other heirs are the estate and the malpractice case was brought for their benefit.

Next, the Bankruptcy Court criticizes the amended schedules. In this case, every time the Debtors amended their schedules, they did so to correct or add so that the schedules would be more correct.

The Bankruptcy Court next criticizes the Debtors in that their latest Statement of Financial Affairs showed that the Debtors had no income for the past two years. Anyone would know that would be untrue and the only explanation would be that the numbers were inadvertently left off, and could easily be corrected. This Bankruptcy Court, however, tries to imply some improper purpose.

Lastly, the Bankruptcy Court questions the income fluctuation of the Debtors. That was the sole reason that the

Debtors moved to convert, and subsequently amend, since their income did change.

The Bankruptcy Court then discussed whether the Chapter 13 was timely prosecuted.

First, the Bankruptcy Court criticizes the Debtors for converting because of the threat of the proposed sale of the Mikos litigation. The Debtors filed their Motion to Convert on November 15, 1999. The Chapter 7 Trustee filed her Motion to Sell the Mikos Litigation on November 19, 1999. Clearly, a review of the IRS Proof of Claim would show that substantial taxes were owed and payment could only be accomplished through a Chapter 13.

Second, the Bankruptcy Court suggests that the Debtors converted because of the order to turn over funds from a COLTAF account. An opinion by the Colorado Supreme Court that came out after the appeal shows that Debtor Dennis Sladek did nothing wrong regarding the flat fee and that it did not matter what account it was in since any unused portion belonged to the client and not the attorney. In re the Matter of Larry D. Sather, 99SA72, Colorado Supreme Court, May 22, 2000.

Third, the Bankruptcy Court criticizes Debtors in that the case was not timely prosecuted. The original Chapter 7 was filed in March, 1998, and this hearing was in July, 2000. This is not an unreasonable delay considering what had occurred previously. In Brent, the Court said:

> "Chapter 11 petition would not be dismissed or converted based on debtor's alleged "unreasonable delay," though approximately six years had passed and no plan of reorganization had yet been confirmed where case was complicated reorganization of oil producer which involved much litigation, negotiation, and settlement."

Id at 110.

In the instant case, the original discharge was in July, 1998, and the case was reopened in March, 1999, after Debtors contacted the Trustee. This last point was raised by Petitioner's counsel who queried: "How on earth could a debtor be in bad faith when the debtor himself reports the claim?" The very notion that a debtor acting in bad faith, self-reports, is patently absurd. Even as counsel argued that if the Mikos litigation should go forward , it still would not take as long as the Brent case .

Lastly, the Bankruptcy Court criticizes the fact that the latest amended Chapter 13 Plan was not in the

Bankruptcy Court file. The record shows it was entered on the docket sheet the next day, and had been mailed several days before.

All of the Bankruptcy Court's holdings are based on speculation and conjecture with at most circumstantial evidence.

The District Court was again wrong. The District Court tries to support the Bankruptcy Court's ruling of bad faith, but makes significant errors in its Order.

The District Court states that the "Sladeks' Motion to Convert was filed after the order of discharge in the original Chapter 7 case." What the Court fails to state is that the original Chapter 7 case was reopened by the Chapter 7 Trustee, and the Motion to Convert was filed in the middle of the proceedings. This is normal bankruptcy proceeding. This is in no way indicative of bad faith.

The District Court states that "there were significant errors of omission in their schedules and once those were discovered the Sladeks moved to exempt them." Once the Sladeks hired an experienced bankruptcy attorney, the schedules were corrected to add omitted items, correct other

items, and add as exemptions all items that could be considered exemptions.

The District Court went on to say that "the case was not timely prosecuted and the Sladeks resisted the Chapter 7 and Chapter 13 Trustees' efforts to administer the estate." If anything it was the efforts of the Trustees to effectively attempt to prevent the Sladeks from exercising their rights.

The District Court goes on to say that the "Sladeks' response to these examples is not credible. They claim mistake and lack of knowledge of the bankruptcy rules, but they initially prosecuted the case pro se and very lately hired bankruptcy counsel."

Additionally, the District Court states that "Both of the exemptions are ongoing malpractice litigations matters which Mr. Sladek is pursuing."

The malpractice case in Florida was prosecuted by Florida attorneys hired by the probate estate. In the Mikos case in Colorado, Ms. Sladek is proceeding *pro se*, and Mr. Sladek represents the two other claimants.

In conclusion, the Order of the Bankruptcy Court to reconvert to a Chapter 7 and the Order of the District Court

affirming the Order of the Bankruptcy Court must be reversed.

CONCLUSION AND PRAYER FOR RELIEF

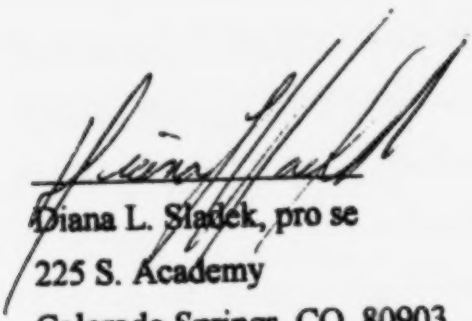
Petitioner's claims are worthy of this Court's consideration and justify the grant of the writ of certiorari. The ruling of the U.S. Court of Appeals for the Tenth Circuit creates a conflict with the other circuits who hold that malpractice actions are not part of the bankruptcy estate as a matter of public policy, and the standards that must be applied by a bankruptcy trustee when selling assets of the estate.

Likewise, Petitioner had a statutory right to convert to a Chapter 13 proceeding. The ruling by the bankruptcy court to convert back to a Chapter 7 proceeding was erroneous and not supported by law.

Petitioner moves this Court to find there is a conflict between the circuits as involving malpractice actions and procedures utilized by bankruptcy trustees. Petitioner also moves this Court to find that she had a right to convert to a Chapter 13 bankruptcy and there existed no viable reason to convert back to a Chapter 7.

Petitioner prays the Court issue the writ and upon review, order that the orders of the lower courts be vacated and remand this cause for further proceedings.

Respectfully submitted this 25th day of November, 2002,



Diana L. Sladek, pro se
225 S. Academy
Colorado Springs, CO 80903
(719) 632-1177